Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

Patricia Simon and John Simon,
Petitioners,

v.

The United States of America,
Respondent.

On Petition For Writ Of Certiorari
To The U.S. Court Of Appeals For The First Circuit.

PETITION FOR WRIT OF CERTIORARI.

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QUESTIONS PRESENTED

1. Does the 'Postal Matter' Exception from liability set forth in 28 U.S.C. Section 1346 (b)(1), bar a claim for the theft of a package which the Postal Service knew contained a decedent's cremated remains and which the Postal Employees stored in an area which they knew to be insecure?

2 Does conduct of the Postal Department which constitutes either 'wanton or willful misconduct' or 'gross negligence' render inapplicable the 'Postal Matter Exception' from liability set forth in 28 U.S.C. Section 1346 (b)(1)?

3 Does the 'Postal Matter' exception from liability set forth in 28 U.S.C. Section 1346 (b) (1) bar a claim for the theft of a package which the Postal Service knew contained a decedent's cremated remains and which the Postal Department stated was not insurable?

PARTIES TO THE PROCEEDING

The names of all parties to the proceedings in the Court whose judgment is sought to be reviewed appear in the caption. There is no parent or subsidiary company of any party.

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OPINION BELOW

The United States Court of Appeals for the First Circuit on September 11, 2009 issued its Judgment affirming the District Court's Allowance of the Motion to Dismiss for Failure to State a Claim filed by the United States of America and Dismissal of the Plaintiffs' action. (Appendix, 2a). The decision of the United States Court of Appeals for the First Circuit is unpublished.

JURISDICTION

On September 11, 2009, the United States Court of Appeals for the First Circuit entered its Judgment affirming the Order of Dismissal by the District Court. The United States Supreme Court has jurisdiction under 28 U.S.C. Section 1254 (a), to review cases in the Courts of Appeals by the grant of a writ of certiorari.

This Petition is grounded under two of the standards governing review of a Petition for Writ of Certiorari, promulgated under the following sections of Rule 10 of the Supreme Court Rules:

(1) under Section (a), a United States Court of Appeals has entered a decision in conflict with the decision of another United States Court of Appeals, and

(2) under Section (c), a United States Court of Appeals has decided an important question of federal law in a way the conflicts with relevant decisions of the United States Supreme Court.

STATUTORY PROVISION INVOLVED

The Petitioners bring this Petition as the United States District Court for the District of Massachusetts and the United States Court of Appeals for the First Circuit dismissed the Petitioners' claim by applying 28 U.S.C. Section 2680 (b), the text of which is:

Section 2680. Exceptions.

The provisions of this chapter and section 1346(b) of this title shall not apply to–

(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

STATEMENT

This case involves the extent to which the "Postal Matter" exclusion of Section 2680 (b), both in terms of the types of claim and the degree of culpable conduct of the Postal Employees resulting in the loss, as follows;: (1) Is a claim for the theft of a box which the Postal Employees knew contained cremated remains and which the Postal Employees nevertheless stored in an area which they knew to be insecure barred; by the exclusion; (2) Does conduct of the Postal Employees constituting either "wanton or willful misconduct" or "gross negligence" affect the exclusion's availability; and (3) Can the Exclusion bar a claim for loss resulting from the Postal Department's employees placed cremated remains which they knew to be uninsurable in a storage area which was insecure and from where the remains were foreseeably stolen?

I. THE FACTS

The Plaintiffs Patricia Simon and John Simon are the two children of the late Eileen Patricia Simon ("Eileen Simon"), who died on April 30, 2007 at Sturdy Memorial Hospital. Eileen Simon's immediate cause of death was a myocardial infarction. She was sixty-one.

Although Eileen Simon was a devout Catholic, her children could not afford a casket, so they arranged to have her cremated at a funeral home and to have her ashes then forwarded for burial with her father, mother and husband at Evergreen Cemetery, Brighton, Massachusetts. Her remains were forwarded for funeral purposes to the R.J. Ross Funeral Home in Wrentham, MA, which performed the services, cremated Eileen Simon's remains, and prepared the remains for shipment by United States Post Office Registered Mail to Evergreen Cemetery.

On May 17, 2007, Richard Ross, the proprietor of the funeral home, had Eileen Simon's remains stored in a box typical in size and shape for the shipment of cremated remains. He brought the box with the cremated remains to the Wrentham (Massachusetts) Post Office for mailing to Evergreen Cemetery. Richard Ross on many occasions had forwarded the ashes of deceased persons who chose to be cremated, and he generally used the Wrentham Post Office. When he would forward the ashes by mail from the Wrentham Post Office, the employees of the Post Office told him that the "safest" and "best" way to send the cremated remains was by registered mail. When he would ask the Postal employees as to how much to declare as the value, the Postal employees told him that the value was "inestimable" and that, "you can't insure sentiment." Richard Ross would therefore declare the value as,"0.00."

When Richard Ross arrived at the Post Office at approximately 4:11 p.m. on the afternoon of May 17, 2007 to mail Eileen Simon's remains for cremation, he was waited upon by a Postal Representative whom he knew by the name of, "David." He told the Postal Employee that the box contained cremated remains, and the employee took extra care in taping the box for Registered Mail Shipment and to tape thoroughly all the corners of the box. Richard Ross mailed the cremated remains by Registered Mail, at a cost of $16.15.

At the time of closing on May 17, 2007, the Postal Employees placed the box, knowing that it contained human remains, and the Post Office's remittance for the day, in the amount of $1,845.98, in the "loading area" for pick-up. The Postal Employees willingly and knowingly placed the remains in an area which was insecure, unlocked, and from which it was foreseeable that there would be either the theft or loss of the box containing the cremated remains of Eileen Simon.

At approximately 6:15 p.m., the highway contract driver employed by R&F Trucking, arrived at the Wrentham Post Office and discovered that the overhead door to the loading dock, located at the rear of the Post Office, was in the "up" position, and the platform used as loading dock was extended. The mail sack, containing remittance of $1,845.95, and the box containing Eileen Simon's remains was missing.

According to the Report of Incident by the United States Postal Service Office of the Inspector General, the box containing the remains of Eileen Simon was lost or stolen.

The Postal Inspectors contacted Richard Ross, and informed him of the alleged theft of Eileen Simon's remains. Richard Ross then discussed the loss of Eileen Simon's remains with an employee of the Post Office, by the name of Jean, who told him that the Post Office had been having problems with the locks of the door to the area where outgoing registered mail was kept, and she was not surprised that a theft had occurred.

The United States Office of the Inspector General assigned Special Agent Mark Nero to investigate the loss of Eileen Simon's ashes, and he met with Patricia Simon at the Attleboro Post Office. He informed Patricia Simon that her mother's ashes were stolen.

A few weeks later, the Post Office representatives contacted Patricia Simon and told her that they were sorry but that they could not locate the ashes and likely would not be able to do so.

On November 14, 2007, Patricia and John Simon, by their counsel, submitted a United States Postal Service Freedom of Information Act Request, asking for a copy of Special Agent Nero's Report, as well as all documents upon which he relied in preparing his report, and all

documents which in any way pertained or referred to the loss of Eileen Simon's ashes. The Report which was produced was substantially redacted, including redaction of substantial portions of the report concerning how Post Office employees secured the area where the remains were secured, and did not include the interviews with Post Office employees whom Special Agent Nero contacted. On January 31, 2008, the attorney for Patricia and John Simon filed an Appeal, and on February 12, 2008, Gladys C. Griffith, the Freedom of Information Act Officer, stated in her response, which continued to refuse to disclose information and documents,

> "...(5 U.S.C. Section 552) Exemption (b) (2) permits the withholding of records that are related solely to the internal personnel rules and practices of the agency. Certain facts relating to the location of the item before its loss were excised under Exemption (b)(2), as disclosure could expose the Postal Service property to additional loss..."

II. THE PETITIONERS' ACTION AND DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

On November 3, 2008, the Petitioners filed their action in the United States District Court for the District of Massachusetts (Boston). On January 8, 2009, the Defendant United States of America ('United States') filed a Motion to Dismiss Plaintiff's Complaint, on the ground that liability against the United States was excluded pursuant to 28 U.S.C. Section 2680 (b). On March 17, 2009, the District Court, Young, J., after hearing, granted the United States' Motion to Dismiss, and on the following day, March 18, 2009, entered an Order Dismissing the Case. (Appendix A).

On March 24, 2009, the Petitioners filed a Notice of Appeal. On September 11, 2009, the United States Court of Appeals for the First Circuit, without oral argument, entered its Judgment affirming the District Court's Order of Dismissal. The Judgment stated, in its first paragraph, that the District Court had dismissed the civil suit for failure to state a claim, because of the 'postal matters exception' set forth in 28 U.S.C. Section 2680 (b), and added, in the second paragraph,

> "Appellants urge that the exception should not apply in this case, because they were denied the option of buying insurance for the shipment of the ashes, and because the defendant's conduct was more than merely negligent, rising to the level of gross negligence. Neither contention is supported by law. The allusion to insurance in Dolan vs. U.S. Postal Service, 546 U.S. 481, 490 (2006) ('losses of the type for which immunity is retained under 2680 (b) are at least to some degree avoidable or compensable through postal registration or insurance') does not affirmatively condition the application of the postal matters exception on the availability of insurance. Appellants' gross-negligence theory is foreclosed by controlling precedent, to which this panel must adhere. Levasseur vs. U.S. Postal Service, 543 F. 3d 23 (1st Circ. 2008)."
>
> (Appendix, B).

REASONS FOR GRANTING THE PETITION

The Petitioners have alleged that they delivered a package containing their mother's cremated remains to the United States Postal Service, that they sent the package by Registered Mail, and that the Postal Service employee knew that the package contained cremated remains. As the package contained cremated remains, it was not insurable. The Postal Service employees willfully and knowingly placed the remains in an area which was insecure, unlocked, and from which it was foreseeable that there would be either the theft or loss of the cremated remains.

The dismissal of the Simon's Complaint reflects a fundamental dichotomy concerning the interpretation and application of the "Postal Matters" exclusion between decisions of the United States Supreme Court and the Circuit Courts. The United States Supreme Court, most recently in its decision of Dolan vs. United States, 546 U.S. 481 (2006), as well as decisions of the Second and Ninth Circuits, all consider the purpose of the postal matters' exception was to protect the United States from the potential landslide of lawsuits that might be generated by the unavoidable mishaps incident to the duties of the postal system, and therefore restrict the exclusion to bar only claims by which the loss resulted by no worse than negligent conduct. These Courts also interpret the 'postal matters' exclusion as only barring claims which were insurable. Conversely, the First Circuit Court of Appeals, most recently in its Judgment dismissing the Petitioner's claim, interprets the exception to bar claims for 'loss' or 'miscarriage' of the mail, even if occasioned by gross negligence, and also interprets the exclusion as barring claims for losses against which the injured party could not have purchased insurance.

I. CONGRESS' INTENT FOR ENACTING THE POSTAL MATTERS EXCEPTION.

The Petitioners' cause of action fundamentally raises the issue of Congressional intent when it established the "postal matters exception" set forth in 28 U.S.C. Section 2680 (b). The Second Circuit has cited the testimony of Abraham Holtzoff, Special Assistant to the Attorney General, before the Senate Subcommittee which considered the proposed legislation, that,

> "Every person who sends piece of postal matter can protect himself by registering it, as provided by the postal laws and regulations. It would be intolerable, of course, it in any case of loss or delay the Government could be sued for damages. Consequently, this provision was inserted."
>
> Hearings on S. 2690 before a Subcomm. Of the Sente Comm. on the Judiciary, 76th Cong. 38 (1940). See Raila vs. United States of America, 355 F. 3d 118, 122 (2d Circ. 2004).

The District Court in the Second Circuit, in consideration of Special Assistant Attorney General Holtzoff's testimony, has observed that,

> "Congress was concerned with shielding the Courts from the potential landslide of suits that might be generated by the unavoidable mishaps incident to the ordinary, accepted operation of delivering millions of packages and letters each year."
>
> Birnbaum vs. United States, 436 F. Supp. 967, 975 (E.D.N.Y., 1977), rev'd in part on other grounds, 568 F. 2d 319 (2d Circ. 1978). See also Raila vs. United States of America, 355 F. 3d 118, 122 (2d Circ. 2004).

The Second Circuit affirmed this reasoning, stating, in a case of "negligent transmission," that the language of the exception itself indicates that it was not aimed to encompass intentional acts, but only negligent omissions, and that on the facts of the case, the letters were not lost or miscarried, so as to exclude the claim based on the exclusion's reference to "loss" or "miscarriage "Upon appeal, the Second Circuit Court of Appeals reversed so much of the District Court decision as ordered the Postal Department to write letter of apology, as the Federal Tort Claims Act only allows money damages and not equitable relief, but otherwise affirmed the District Court decision. Birnbaum vs. McMillen, 588 F. 2d 318, 328 (2d Circ. 1978).

This express reason for the enactment of the Postal Matters exception, as stated by the Birnbaum District Court decision, to

> "shield(ing) the Courts from the potential landslide of suits that might be generated by the unavoidable mishaps incident to the ordinary, accepted operation of delivering millions of packages and letters each year",

in no way justifies the interpretation and extension of the exception by the First Circuit, to bar the Petitioner's claim for a mishap which was totally avoidable, as it was the result of the Postal Service Employees' grossly negligent conduct of consciously storing cremated remains in a knowingly insecure location. The fate of the Petitioners' claim depended on the judicial circuit in which their loss was suffered. The Supreme Court should grant certiorari so that future claimants no longer face this unjust fate.

II. THE FIRST CIRCUIT'S INTERPRETATION OF THE POSTAL MATTERS EXCEPTION IS INCONSISTENT WITH CONGRESS'S INTENT AND DECISIONS OF THE UNITED STATES SUPREME COURT AND THE SECOND CIRCUIT.

The interpretation of the purpose of the Postal Matters Exception under 28 U.S.C. Section 2680(b) as protecting the United States from liability from "the potential landslide of suits that might be generated by the unavoidable mishaps incident to the ordinary, accepted operation of delivering millions of packages and letters each year" has logically resulted in the United States Supreme Court and the Circuit Courts determining that the exception bars only claims occasioned by no more than negligent conduct and which are not insurable. The First Circuit's far more expansive construction of the exception has resulted in its conclusion that the exception bars claims of 'loss' or 'miscarriage' resulting from intentional conduct regardless of whether the loss was insured.

A. There is a Conflict Concerning whether the Postal Service Exception is Limited To Loss Attributable to No Worse than Negligent Conduct.

In the case of Dolan vs. United States, 546 U.S. 481 (2006), the Supreme Court considered a claim arising from the negligent placement of the mail so as to cause a 'slip and fall' hazard by which a person tripped over mail left at one's home. The Court, in considering the meaning of the word 'transmission,' as used in the exception, stated,

> "If considered in isolation, the phrase 'negligent transmission' could embrace a wide range of negligent acts committed by the Postal Service in

the course of delivering mail, including creation of slip-and-fall hazards from leaving packets and parcels on the porch of a residence. After all, in ordinary meaning and usage, transmission of the mail is not complete until it arrives at the destination. ... The definition of words in isolation, however, is not necessarily controlling in statutory construction. A word in a statute may or may not extend to the outer limits of its definitional possibilities. Interpretation of a word or phrase depends upon reading the whole statutory text, considering the purposes and context of the statute, and consulting any precedents or authorities that inform the analysis. Here, we conclude that both context and precedent require a narrower reading, so that 'negligent transmission' does not go beyond negligence causing mail to be lost or arrive late, in damaged condition, or to the wrong address. ...The phrase does not comprehend all negligence occurring the course of mail delivery..."

Dolan, at page 486.

The Court continued,

"Starting with context, the words 'negligent transmission' in Section 2680 (b) follow two other terms, "loss" and "miscarriage." Those terms, we think, limit the reach of 'transmission.' '(A) word is known by the company it keeps'- a rule that is 'often wisely applied where a word is capable of many meanings in order to avoid the giving of unintended breadth to the acts of Congress."....

Dolan, at page 486.

In concluding that "transmission" as used in the exception did not exclude loss resulting from a 'slip and fall' on a package allegedly negligently placed by a Postal delivery person, but only loss resulting from the occurrences such as the delay or loss of postal matter, the Court said,

> "Here, as both parties acknowledge, mail is 'lost' if it is destroyed or misplaced and 'miscarried' if it goes to the wrong address. Since both terms refer to failings in the postal obligation to deliver mail in a timely manner to the right address, it would be odd if 'negligent transmission' swept far more broadly to include injuries like those alleged here—injuries that happen to caused by postal employees but involve neither failure to transmit mail nor damage to its contents."
>
> Dolan, at page 487.

These statements were all directed to the issue before the Dolan Court, whether the postal matters exception barred a claim for loss resulting from the "slip and fall" over mail which Postal employee(s) had negligently placed so as to result in the fall. The rationale, however, is very pertinent as to whether "loss" or "miscarriage," as used in the exception, is limited to merely "negligent" conduct, or extends to grossly negligent or intentional conduct. The Supreme Court, in Dolan, specifically stated that "negligent transmission" does not go beyond negligence causing mail to be lost or arrive late, in damaged condition, or to the wrong address. Dolan, at page 486. The "limit" of the conduct for which losses occasioned by the transmission of mail is therefore set at "negligence," and no more. As the Dolan Court stated that "a word is known by the company that it keeps," Dolan, at page 486, then it would be similarly incongruous if

the words "loss" or "misplaced" swept more broadly, so as to include grossly negligent or intentional conduct, than did the standard of conduct which applied to loss occasioned by, "transmission."

Previous to the Supreme Court decision in Dolan, the Second Circuit had concluded that the postal matters exception did not exclude losses from Postal Service Employees' actions which were intentional. Birnbaum vs. McMillen, 588 F. 2d 318, 328 (2d Circ. 1978).

However, the First Circuit, after the Dolan decision, but without citation to Dolan, ruled that even though the Postal Exception exclusion only limited loss occasioned by "negligent transmission," the exclusion's bar for "loss" or "miscarriage" was not so limited. The First Circuit therefore held that the exception barred claims for "loss" or "misplacement," even if resulting from intentional conduct or theft. LeVasseur vs. U.S. Postal Service, 543 F. 3d 23, 24 (1st Circ., 2008). This holding completely disregards the Dolan rationale, that a "word is known by the company that it keeps."

B. The First Circuit's Holding that the Exception Does Not Depend on the Availability of Insurance is at Odds with the Supreme Court and Other Circuits.

Previous to Dolan, the Second Circuit held that where the nature of the injury is such that the injured person could not protect himself by registering the parcel, the Postal Matters exception did not apply. Birnbaum vs. United States, 436 F. Supp. 967, 974 (E.D.N.Y., 1977), rev'd in part on other grounds, 568 F. 2d 319 (2d Circ. 1978) and Raila vs. United States, 355 F. 3d 118, 122 (2d Circ. 2004).

The Dolan Court specifically stated that losses of the type for which sovereign immunity is retained under the

Postal Matters exception, Section 2680 (b), are at least some degree avoidable or compensable through postal registration and insurance. Dolan, at page 490.

Since Dolan, the First and the Ninth Circuits have disagreed on whether the Dolan Court expressly conditioned the Postal Matters exception to losses which were compensable by insurance. The Judgment of the First Circuit in the case at bar stated that the Supreme Court, in Dolan,

> "...does not affirmatively condition the application of the Postal Matters exception on the availability of insurance."

App., p. 3.

However, the Ninth Circuit did construe the Dolan Court holding as approving the Second Circuit's reasoning that, "...focused on whether the plaintiff could insure against the harm of which she complained.' MB Financial Group, Inc. vs. United States Postal Service, 545 F. 3d 814, 818 (9th Circ. 2008)

C. There is a Very Strong Showing of a Factual Basis for the Petitioners' Allegations.

The Petitioners' averments justify the inference that the actions of the United States Postal Service constituted "gross negligence" or "wanton or willful misconduct." The Petitioners' Complaint alleges, based on the statements of employees of the Wrentham Police Department to Mr. Ross, that the condition of the storage area had for some time been left insecure, and that one employee was not surprised by the loss of the articles. The Postal Department has declined to provide information concerning the causes of the loss, on the ground that the disclosure might "expose the Postal Department to additional loss." These allegations,

for pleading purposes, set forth claims in both "gross negligence" and "reckless conduct." "Reckless conduct" has been defined as, "When in the face of a known risk, one intentionally persists in conduct involving a high degree of probability that substantial harm might result to another," McConville vs. Massachusetts Bay Transportation Authority, 852 Fed. Supp. 1, 2 (D. Mass. 1994), quoting from Siver vs. Atlantic Union College, 338 Mass. 212, 216 , 154 N.E. 2d 360, 363 (1958), or

> " ...the state of mind accompanying an act, which either pays no regard to its probably or possibly injurious consequences, or which, though foreseeing such consequences, persists in spite of such knowledge. To be reckless, the conduct must be such as to evince a disregard of or indifference to consequences although no harm was intended. "
>
> In re. Sullivan, 238 B. R. 230, 237 (Bankr. D. Mass. 1999), cited in Rutanen vs. Baylis, 275 B.R. 145, 152 (Banrk. D. Mass. 2002).

In order to constitute gross negligence, the conduct of the Defendant must be characterized by a "high degree of culpability and indifference to duty" and is "substantially, and appreciably, higher in magnitude to ordinary negligence". McConville vs. Massachusetts Bay Transportation Authority, 852 Fed. Supp. 1, 3 (D. Mass. 1994, quoting from McGrath vs. G&P Thread Corporation, 353 Mass. 60, 62 , 228 N.E. 2d 450, 452 (1967) and Peck vs. Garfield, 862 F. 2d 1 (1st Circ. 1988), respectively.

In determining the sufficiency of the allegations of 'gross negligence' or 'wanton or willful misconduct,' the Court must also consider the refusal of the United States Post Office and Office of Inspector General to turn over all of its information. The Post Office has declined to

provide the entire explanation as to why it lost Eileen Simon's remains. The Courts of the Commonwealth of Massachusetts have, in certain circumstances, imposed on a party the burden to produce information in its own possession. See Knowles vs. Gilchrist, 362 Mass. 642; 652, 289 N.E. 2d 879, 885 (1972), William Rodman & Sons, Inc. vs. State Tax Commission, 373 Mass. 606; 611, 368 N.E. 2d 1382, 1385 (1997), and Meehan vs. Shaughnessy 404 Mass. 419; 441-448, 535 N.E. 2d 1255, 1167-1271 (1989), all of which stand for the principle that the party with greater access to the evidence has the burden to produce same. See also Wilson vs. Honeywell, 409 Mass. 803, 808; 569 N.E. 2d 1011, 1014 (1991). (res ipse loquitur – Defendant's failure to explain "adds weight" to inference of negligence).

Sadly, the Simons have not been provided critical information concerning the theft of their mother's cremated remains. As the Simons have alleged that the conduct of the Postal Employees was either "gross negligence" or "wanton or willful misconduct," the refusal of the Postal Department to provide information justifies, at this juncture, all inferences in favor of the Simons. The action should not be dismissed until the Postal Department provides all its information concerning how the cremated remains were stolen. Only then will the Simons fully know the level of culpability against which the applicability of the "Postal Matters exclusion" can be assessed.

CONCLUSION

The instant petition would help resolve the dichotomies concerning the interpretation of the "Postal Matters Exception." Essentially, at its very core, the allegations involve the Postal Employees' knowing registration of a box containing cremated remains. The

employees knew that the loss of such a package would result in emotional trauma to the deceased person's family against which trauma insurance could not be purchased. The employees nevertheless knowingly placed this box of cremated remains in an area they knew to be insecure, and the remains were stolen.

If the Court were to construe the Postal Matters exception as limited to

> "shield(ing) the Courts from the potential landslide of suits that might be generated by the unavoidable mishaps incident to the ordinary, accepted operation of delivering millions of packages and letters each year", Birnbaum vs. United States, 436 F. Supp. 967, 975 (E.D.N.Y., 1977), rev'd in part on other grounds, 568 F. 2d 319 (2d Circ. 1978),

then the Petitioner's case would not be barred. However, the First Circuit applies a standard as to which the "Postal Matters" exception absolves all actions of the Postal Employees, regardless of degree of negligence or even intent, and regardless of whether the resulting loss is insurable.

As the First Circuit has continued to so hold even after the Dolan decision, it is clear that the First Circuit will not reconsider its position unless there is a decision of the United States Supreme Court expressly ruling on these issues.

The Petitioner's application would provide the Supreme Court with the opportunity to expressly direct how the Circuit Courts are to apply the "Postal Matters" exception and resolve the disparities between the Circuits concerning its application.

Respectfully submitted,

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APPENDIX

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No: 08-11841-WGY

SIMON

Plaintiff

v.

UNITED STATES

Defendant

ORDER OF DISMISSAL

YOUNG, D.J.

After a hearing held on 3/17/09, this Court Orders that the Defendant's Motion to Dismiss is Allowed and the above entitled action be and hereby is Dismissed

Sarah Thornton
Clerk
/s/ Elizabeth Smith
By: Deputy Clerk

March 18, 2009

Notice mailed to counsel of record.

United States Court of Appeals
For the First Circuit

No. 09-1412

PATRICIA SIMON, ET AL.,
Plaintiffs, Appellants,

v.

UNITED STATES,
Defendant, Appellee.

Before
Torruella, Lipez and Howard,
Circuit Judges.

JUDGMENT
Entered: September 11, 2009

The cremation ashes of the mother of appellants Patricia Simon and John Simon, deposited in the United States mail for delivery to a mortuary, were apparently stolen from an unsecure loading area of a post office. Appellants claimed under the Federal Tort Claims Act (FTCA). Their administrative claim was denied on the basis of the "postal matters exception" to the FTCA. 28 U.S.C. § 2680(b)("Any claim arising out of the loss, miscarriage or negligent transmission of letters or postal matter."). For the same reason, the district court dismissed their civil suit for failure to state a claim.

Appellants urge that the exception should not apply in their case, because they were denied the option of buying insurance for the shipment of the ashes,

and because the defendant's conduct was more than merely negligent, rising to the level of gross negligence. Neither contention is supported by the law. The allusion to insurance and registration in Dolan v. U.S. Postal Service, 546 U.S. 481, 490 (2006)("losses of the type for which immunity is retained under § 2680(b) are at least to some degree avoidable or compensable through postal registration and insurance") does not affirmatively condition the application of the postal matters exception on the availability of insurance. Appellants' gross-negligence theory is foreclosed by controlling precedent, to which this panel must adhere. Levasseur v. U.S. Postal Service, 543 F.3d 23 (1st Cir. 2008).

The judgment is **affirmed**.

By the Court:

/s/ Richard Cushing Donovan, Clerk.

cc:

Paul S. Hughes

Jennifer A. Serafyn

Supreme Court, U.S.
FILED
MAR 12 2010
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No. 09-678

In the Supreme Court of the United States

PATRICIA SIMON AND JOHN SIMON, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

The postal-matter exception to the Federal Tort Claims Act, 28 U.S.C. 2680(b), preserves the government's sovereign immunity for "[a]ny claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter." The question presented is whether this provision encompasses petitioners' claim that their shipment of postal matter was stolen from the Postal Service, was never recovered, and was thus never delivered to its intended recipient.

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PATRICIA SIMON AND JOHN SIMON, PETITIONERS

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The judgment of the court of appeals (Pet. App. 2a-3a) is unreported. The order of dismissal by the district court (Pet. App. 1a) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 2a-3a) was entered on September 11, 2009. The petition for a writ of certiorari was filed on December 10, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Subject to a number of important limitations, the Federal Tort Claims Act (FTCA) waives the sovereign immunity of the United States by conferring federal-court jurisdiction over tort cases alleging negligence or

wrongful acts committed by federal employees in the course of their employment. 28 U.S.C. 1346(b)(1). As to claims falling within this jurisdictional grant, the FTCA generally makes the United States liable "in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. 2674.

There are 13 categories of exempted claims under the FTCA. 28 U.S.C. 2680. The exemption at issue in this case pertains to postal operations and provides that "[t]he provisions of this chapter and section 1346(b) of this title shall not apply to * * * [a]ny claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter." 28 U.S.C. 2680(b).

2. Petitioners in this case deposited the cremation ashes of their mother with the United States Postal Service (USPS) for delivery to a mortuary. Pet. App. 2a. Petitioners did not have the option of purchasing insurance for the shipment. *Ibid.* Subsequently, the ashes apparently were stolen from a loading area of the post office. *Ibid.* The ashes were never found, and were not delivered to their intended destination.

Petitioners filed with the Postal Service an administrative claim under the FTCA. See 28 U.S.C. 2675. The Postal Service denied the claim based on the statute's postal-matter exception, 28 U.S.C. 2680(b). See Pet. App. 2a.

Petitioners then filed this FTCA action in federal district court. The district court granted the government's motion to dismiss petitioners' action. Pet. App. 1a.

Petitioners appealed the dismissal, contending that the postal-matter exception was inapplicable because they had been denied the opportunity to buy insurance and that the conduct of the USPS exceeded mere negli-

gence, "rising to the level of gross negligence." Pet. App. 2a-3a. The court of appeals affirmed. The court reasoned that "[t]he allusion to insurance and registration in *Dolan v. U.S. Postal Service*, 546 U.S. 481, 490 (2006) ('losses of the type for which immunity is retained under § 2680(b) are at least to some degree avoidable or compensable through postal registration and insurance') does not affirmatively condition the application of the postal matters exception on the availability of insurance." Pet. App. 3a. The court of appeals further determined that petitioners' "gross-negligence theory is foreclosed by controlling precedent, to which this panel must adhere." *Ibid.* (citing *Levasseur* v. *USPS*, 543 F.3d 23 (1st Cir. 2008)).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is not warranted.

1. Petitioners' claim fits squarely within the postal-matter exception to the FTCA. That exception provides that the FTCA's waiver of sovereign immunity "shall not apply to * * * [a]ny claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter." 28 U.S.C. 2680(b). Here, the theft of petitioners' package resulted in "loss," see *C.D. of NYC, Inc.* v. *USPS*, 157 Fed. Appx. 428, 429 (2d Cir. 2005), cert. denied, 549 U.S. 809 (2006); *Georgacarakos* v. *United States*, 420 F.3d 1185, 1188 (10th Cir. 2005), and thus falls under the plain language of the statute. Indeed, the loss of petitioners' shipment is quintessentially the kind of loss for which the postal-matter exception was created. As this Court explained in *Dolan* v. *USPS*, 546 U.S. 481 (2006), "Congress intended to retain immunity,

as a general rule, only for injuries arising, directly or consequentially, because mail either fails to arrive at all or arrives late, in damaged condition, or at the wrong address." *Id.* at 489. Here, petitioners seek to recover because the package mailed on their behalf "fail[ed] to arrive at all," *ibid.*, and their claim therefore is barred.

2. Petitioners nevertheless contend (Pet. 10-14) that the postal-matter exception does not extend to their claim of gross negligence and that the court of appeals decision to the contrary conflicts with this Court's decision in *Dolan* and the Second Circuit's decision in *Birnbaum* v. *United States*, 588 F.2d 319 (1978). That argument is without merit.

In *Dolan*, this Court construed the phrase "negligent transmission" to encompass injuries of the type comprehended by the terms "loss" and "miscarriage" that precede it in the statutory exception, and thereby to exclude injuries resulting from tripping over a package that was placed by a Postal Service employee at its destination. 546 U.S. at 486. Petitioners argue (Pet. 13-14) that just as the *Dolan* Court limited the scope of "negligent transmission" to the types of injuries covered by "loss" and "miscarriage," so too should the standard of care applied to "loss" and "miscarriage" be limited to that which applies to "transmission"—namely negligence. The *Dolan* Court was engaged in the well-established practice of construing an ambiguous term in a statute (transmission) by looking to the surrounding words. See, *e.g.*, *Jarecki* v. *G.D. Searle & Co.*, 367 U.S. 303, 307 (1961) (noting that an ambiguous term "gathers meaning from the words around it"). However, petitioners do not seek to clarify an ambiguous term. Rather, they advocate reading a legal element (negligent) into the postal-matter exception that is not contained in the

statute for "loss" and "miscarriage." This Court "ordinarily resist[s] reading words or elements into a statute that do not appear on its face." *Bates* v. *United States*, 522 U.S. 23, 29 (1997).

Contrary to petitioners' contention, in fact, the statutory language is inconsistent with petitioners' interpretation. If Congress had wanted "negligent" to apply to all three terms in the exception, presumably it would have placed the adjective in front of those terms so as to read "any claim arising out of the [*negligent*] loss, miscarriage, or [] transmission of letters or postal matter." But Congress did not do so. Instead, it placed "negligent" immediately in front of "transmission" so as to modify only that term. Thus, basic rules of grammar foreclose petitioners' argument. See *Department of Hous. & Urban Dev.* v. *Rucker*, 535 U.S. 125, 129 n.2, 131 (2002) (observing that the Ninth Circuit's holding that "under the tenant's control" in the phrase, "any member of the household, a guest, or another person under the tenant's control," modifies not just "another person," but also "member of the household" and "guest," "runs counter to basic rules of grammar").

Petitioners' contention (Pet. 10) that the Second Circuit's 1978 decision in *Birnbaum* interpreted the postal-matter exception to include only negligence torts is equally unavailing. A similar claim was persuasively rejected in *Levasseur* v. *USPS*, 543 F.3d 23 (1st Cir. 2008), on which the court below relied. As *Levasseur* explained, the court's comment in *Birnbaum* that "[t]he language of the exception itself indicates that it was not aimed to encompass intentional acts," 588 F.2d at 328, referred only to the "negligent transmission" element and not to "loss" or "miscarriage." See *Levasseur*, 543 F.3d at 24. Had the *Birnbaum* court's remark extended

to "loss" and "miscarriage," it would have conflicted with that circuit's decision in *Marine Ins. Co.* v. *United States*, 378 F.2d 812 (2d Cir.), cert. denied, 389 U.S. 953 (1967), which held that "the § 2680(b) exception applied to the *theft* of postal matter by a governmental employee" (emphasis added).[1] *Levasseur*, 543 F.3d at 24. Theft, of course, is an intentional tort.

3. Nor is there any merit to petitioners' contention that the postal-matter exception applies only to claims for which insurance is available. Pet. 14-15. In support of their argument, petitioners cite (*ibid.*) the Court's observation in *Dolan* that "losses of the type for which immunity is retained under § 2680(b) are *at least to some degree* avoidable or compensable through postal registration and insurance." 546 U.S. at 490 (emphasis added). That language cannot bear the weight of petitioners' argument. The Court noted that the existence of postal insurance lends "[f]urther support[]," *ibid.*, to its interpretation of the statute. It did not hold that application of the postal-matter exception is conditioned upon the availability of insurance for the particular postal matter in question, and nothing in the text of Section 2680(b) supports such a limitation. Indeed, that argument is foreclosed by the plain language of the statute, which explicitly covers letters, 28 U.S.C. 2680(b), despite the fact that letters are ineligible for postal insurance, USPS, *Mailing Standards of the United States Postal Service: Domestic Mail Manual* § 503.4.2.3(f) (Feb. 1, 2010).[2]

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[1] *Levasseur* further noted that "[s]ince *Birnbaum* did not involve a loss, the remark in question also would have been dicta if it was meant to apply thereto." 543 F.3d at 24.

[2] Petitioners also cite (Pet. 15) dicta in *MB Financial Group, Inc.* v. *USPS*, 545 F.3d 814 (9th Cir. 2008) (*MB*), noting *Dolan*'s approval of

Petitioner's interpretation would greatly undermine the postal-matter exception. There are countless items sent through the mail that have no actual, insurable value, but have great personal or emotional value. Certainly Congress did not contemplate exclusion of such items from the postal-matter exception. Indeed, *Dolan* characterized such items as "[i]llustrative instances of the exception's operation" when it noted that the exception applies to "personal or financial harms arising from nondelivery or late delivery of sensitive materials or information (*e.g.*, medicines or a mortgage foreclosure notice)." 546 U.S. at 489.

To be sure, in some circumstances, insurability by the Postal Service may indicate that the loss is covered by the exception, but it is not determinative. Here, the type of tort alleged by petitioners is ordinarily one that could be protected by insurance, but petitioners were unable to insure against the injury they suffered because the value they attached to their package was of a sort that could not readily be insured. In other words, the unavailability of insurance was due to the type of injury that petitioners suffered, not the type of tort they alleged.

"focus[ing] on whether the plaintiff could insure against the harm of which she complained." *Id.* at 818. *MB* involved potential government liability for failure to make available a post office box that the Postal Service was purportedly obliged to provide for the plaintiff's business mail (specifically, failure to properly process the renewal of the box.) The court held that the case did not arise out of the "negligent transmission" of mail. It reasoned that "*Dolan* may also be read as distinguishing between the historically governmental service of carrying the United States mail and the performance of acts that may be related to delivery, but constitute more ordinary activities that private actors engage in as well." *Id.* at 817.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 09-678.

IN THE

Supreme Court of the United States

Patricia Simon and John Simon,
Petitioners,

v.

The United States of America,
Respondent.

On Petition For Writ Of Certiorari
To The U.S. Court Of Appeals For The First Circuit.

PETITIONERS' REPLY BRIEF.

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CONGRESSIONAL RECORD.

Hearings on S. 2690 before a Subcomm. of the Senate Comm. on the Judiciary, 76th Cong. 38 (1940).

The Petitioners wish to reply to the following contentions set forth by the United States in opposition to the Petitioner's Petition for Writ of Certiorari:

(1) The United States' contention that the Petitioner's claim is for "loss," as opposed to "negligent transmission;" (pages 3-4);

(2) Its argument that the very words of the exception, "....loss, miscarriage or negligent transmission," by themselves must be interpreted to bar a claim for "loss" or "miscarriage" resulting from conduct which constitutes gross negligence or intentionally wrongful conduct (Opposition, pages 4-5); and

(3) Its belief that there is no split between the First and Second Circuit Courts of Appeals concerning whether the "postal matters exception," 28 U.S.C. Section 2680 (b), bars claims resulting from conduct which constitutes "gross negligence" or intentionally wrongful conduct; (Opposition, pages 5-6).

I. The Petitioners' Claim Constitutes both "Negligent Transmission" and "Loss."

The Petitioners have alleged that Postal Service knowingly placed the box forwarding their mother's cremated remains in an insecure area, and that both the box and the Postal Station's receipts from the day were stolen. A Postal Employee's placement of the box in an insecure area is certainly a step in the "transmission" of the box and its contents. It is arguably more a matter of "transmission" than "loss," as if the box was stolen, it would arguably not be a "loss" caused by the Postal Employee, unless the Postal Employee were personally involved with the theft. In any event, these facts could be considered both "transmission" and/or "loss."

II. The Words "Loss" or "Miscarriage" Are Not Inherently Construed to Include Grossly Negligent or Intentional Conduct.

The United States contends that the words "loss" or "miscarriage" have such a common meaning that the Court should not construe them in light of the statutory language of "negligent transmission." Opposition, page 5. However, this argument is absolutely inconsistent with the Court's observation in of Dolan vs. United States, 546 U.S. 481 (2006),

> " ... The definition of words in isolation, however, is not necessarily controlling in statutory construction. A word in a statute may or may not extend to the outer limits of its definitional possibilities. Interpretation of a word or phrase depends upon reading the whole statutory text, considering the purposes and context of the statute, and consulting any precedents or authorities that inform the analysis. Here, we conclude that both context and precedent require a narrower reading, so that 'negligent transmission' does not go beyond negligence causing mail to be lost or arrive late, in damaged condition, or to the wrong address. ...The phrase does not comprehend all negligence occurring the course of mail delivery..."

Dolan, at page 486.

Another leading rule of statutory construction is that a statute must be construed to accomplish an harmonious and rational result. To this end, the Opposition does not suggest any plausible reason why Congress would only limit "transmission" to omissions by Postal Employees which were no worse than "negligent," but would extend the bar to claims resulting from Postal Employees

"loss" or "miscarriage" even if the employees' actions were grossly negligent or intentional. Such an uneven and imbalanced construction of the "postal matters" exception should not be permitted.

Moreover, the Opposition's contention, that as Congress expressly qualified "transmission" by the adjective "negligence" evidences an intent that "loss" or "miscarriage" not be so limited, is fundamentally unsound, as the words "loss" or "miscarriage" themselves suggest no worse than negligent conduct, without the necessity of adding the word, "negligent." Human experience is that one who says he or she "lost" something does not mean that he or she willfully or maliciously destroyed or stole the item, but only is confessing to an event of everyday human imperfection. Conversely, if Congress had intended "loss" to extend to "theft," Congress would have explicitly included "theft" in the "postal matters" exception. See Avery vs. United States, 434 Fed. Supp. 937, 945 (Dist. Ct. Conn. 1977), in which the Court compared the "postal matters" exception, Section 2680 (b), with the "intentional tort" exception, Section 2680 (h). Congress' selection of the words "loss," "miscarriage" and "negligent transmission," both of which connote negligence, in the "postal matters" exception of Section 2680 (b) and its specific inclusion of intentional torts in the bar from recovery set forth in Section 2680 (h), establish its intent that the "postal matters" exception be limited to conduct no more culpable than negligent.

III. The Second Circuit Court of Appeals has Ruled that the "Postal Matters" Exception is Limited to Negligent Conduct, and Does Not Bar Claims for Loss Resulting from Intentional Conduct.

The Petition, at pages 9 and 10, cites the statement of the District Court in the Second Circuit, that the purpose

for the enactment of the "postal matters" exception was,

> "Congress was concerned with shielding the Courts from the landslide of suits that might be generated from the potential landslide of suits that might be generated by the unavoidable mishaps incident to the ordinary, accepted operation of delivering millions of packages and letters each year."
>
> Birnbaum vs. United States, 436 F. Supp. 967, 975 (E.D.N.Y. 1977), rev'd in part on other grounds, 588 F. 2d. 319 (2d Circ. 1978). See also Railla vs. United States, 355 F. 3d 118, 122 (2d Circ. 2004).

The District Court's ruling was appealed to the Second Circuit, which affirmed the District Court's reasoning, stating, in a case of "negligent transmission," that the language of the exception itself indicates that it was not aimed to encompass intentional acts, but only negligent omissions, and that on the facts of the case, the letters were not lost or miscarried, so as to exclude the claim based on the exclusion's reference to "loss" or "miscarriage." The Second Circuit Court of Appeals only reversed so much of the District Court decision as ordered the Postal Department to write letter of apology, as the Federal Tort Claims Act only allows money damages and not equitable relief, but otherwise affirmed the District Court decision. Birnbaum vs. McMillen, 588 F. 2d 319, 328 (2d Circ. 1978).

The Opposition, on pages 6 and 7, relies on the discussion of the First Circuit Court of Appeals in Levasseur vs. USPS, 543 F. 3D 23, 24 (1ST Cir. 2008), in which the First Circuit (1) interpreted the Birnbaum decision as referring solely to the words

"negligent transmission" and (2) further stated that any interpretation of the Birnbaum decision as limiting "loss" or "miscarriage" to negligent conduct would be inconsistent with the Second Circuit's decision in Marine Insurance Co. vs. United States, 378 F. 2d 812 (2d Circ.), cert. denied, 389 U.S. 953 (1967). However, the Birnbaum decision itself forecloses both of these constructions. The Second Circuit wrote, concerning its construction of the degree of culpable conduct which the "postal matters" forecloses recovery;

> "We turn next to the postal exception, which also requires little discussion. The exception relates to 'any' claim arising out of the loss, miscarriage or negligent transmission of letters or postal matter."
>
> "The language of the exception itself indicates that it was not aimed to encompass intentional acts. Had Congress intended to bring intentional disturbance of the integrity of a letter within the postal exception, it would not have used the term 'negligent transmission.' Nor were the letters lost or miscarried. 'Miscarriage' in the context of the mail means misdelivery." Birnbaum, at page 328.

The Second Circuit, in its aforementioned, unqualified language, stated that the exception was not aimed to encompass intentional acts.

Towards the second point raised in Levasseur, the Second Circuit in Birnbaum also expressly disposes of the contention that its decision was inconsistent with its holding in Marine Insurance. Insurance, stating, in a footnote,

> "...Marine Insurance held that where customs agents had temporarily removed and treated a

> mailed package of emeralds with a fluorescent powder to detect a thief, the subsequent loss of the package by postal authorities fell within the postal exception. The claim in Marine Insurance was not for redress because of the temporary removal and treatment of the package, but for its subsequent 'loss' from the postal system, which would have occurred even if the interception had not taken place." Birnbaum, at page 328, fn 20, citing from Marine Insurance, 378 F. 2d at 815.

As stated by the Second Circuit, the Marine Insurance appeal was not decided on the proposition that the "postal matters" exception foreclosed claims resulting from "intentional conduct," but rather that the actions of the postal workers were not the ultimate, "proximate" cause of the loss.

IV. Conclusion.

The decision of the First Circuit Court of Appeals from which the Petitioners request certiorari holds that the "postal matters" exception is not limited to conduct of Postal Employees' which is no worse than negligent, but bars claims for "loss" or "miscarriage" resulting from actions of Postal Employees which constitute "gross negligence" or even intentional conduct. The position of the United States, that this holding is not in conflict with both the Supreme Court's holding in Dolan and with the holdings of the Second Circuit, is incorrect. The viability of the Petitioners' claim was decided by the Circuit in which they suffered their loss. The Petitioners request that the United States Supreme Court grant certiorari, so that the claims of the Petitioners and any future claimants will not be determined by the inconsistent interpretations of the "postal matters" exception by the different Circuit Courts of Appeals.

Respectfully submitted,

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